IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1119

WILLIAM HERBERT ORR,

Appellant,

v.

LILLIAN M. ORR,

Appellee.

APPEAL FROM THE SUPREME COURT OF ALABAMA

BRIEF OF APPELLEE

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SUMMARY OF ARGUMENT

A statute which confers an economic preference on women is constitutional, but a statute which economically prefers men, or prefers either sex for non-economic reasons, is unconstitutional. The Alabama Alimony Law economically prefers women, and is constitutional.

Statutes economically preferring women are constitutional if their purpose is to reduce the disparity in economic condition between men and women caused by the long history of discrimination against women.

The Alabama Alimony Law does not penalize women, and it was enacted as compensation for past discrimination.

ARGUMENT

I

THE ALABAMA ALIMONY LAW CONFERS AN ECONOMIC PREFERENCE ON WOMEN AS COMPENSATION FOR PAST DISCRIMINATION.

The Alabama Alimony Statutes[1] unquestionably prefer women. Only the divorced wife, under Alabama law, may apply for and receive alimony.[2] The question presented by this case is whether the preference in favor of women afforded by these statutes is constitutionally permissible. Ms. Orr maintains that the statutes are constitutional.

Prior to 1971, legislative classifications by gender were consistently and routinely upheld by this Court.[3] Since 1971 this Court has taken a different approach in cases involving statutes with classifications on the basis of gender. A review of recent cases will indicate that a clearly defined rule pertaining to gender classification statutes has evolved.

This is the rule: A statute which conferes an economic preference on women is constiutional, but a statute which economically prefers men, or prefers either sex for non-economic reasons, is unconstitutional. The

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[1] *Code of Ala.*, 1975, Sections 30-2-51 through 30-2-53. These statutes formerly appeared in the *Code of Ala.* as Title 34, Sections 31-33 (1940) (Recomp. 1958).

[2] *Davis v. Davis*, 279 Ala. 643, 180 So.2d 158 (1966).

[3] See for example: *Muller v. Oregon*, 208 U.S. 412 (1908); *Goesaert v. Cleary*, 335 U.S. 464 (1948); and *Hoyt v. Florida*, 368 U.S. 57 (1961).

Alabama Alimony Statutes economically prefer women, and they are, therefore, constitutional.

The application of this rule is best demonstrated by a comparison of two cases decided by this Court in March of 1977.[4] Part of the Social Security Act which economically discriminated against women was held unconstitutional on March 2, 1977, in *Califano v. Goldfarb*. Nineteen days later in *Califano v. Webster* a portion of the Social Security Act which economically discriminated in favor of women was held constitutional.

At issue in *Goldfarb* was a federal statute which provided certain benefits for widows which were not available to widowers. The Court reasoned, as it had in *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), that the statute operates to deprive working women of the protection for their families which a similarly situated male worker would have received. Such a gender-based distinction penalizes the efforts of female workers, and is unconstitutional.

The statute challenged in *Webster* rewarded, rather than penalized, female workers, and it was held to be constitutional. That statute provided for higher old-age benefits for a retired female wage earner than for a retired male wage earner. The Court viewed this law as compensatory legislation designed to serve the important governmental objective of reducing the disparity in economic condition between men and women caused by a long history of economic discrimination against women.

The only difference in the statutes considered in *Goldfarb* and *Webster* was that one economically preferred women, and the other economically preferred

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[4] *Califano v. Goldfarb*, 430 U.S. 199 (1977) and *Califano v. Webster*, 430 U.S. 313 (1977).

men. The rule favoring economic preferences for women, described above, was applied, and the *Goldfarb* statute failed because it economically preferred men, while the *Webster* statute passed because it economically preferred women.

Goldfarb and *Webster,* because of their proximity in time, serve as a dramatic illustration of this Court's application of the rule allowing legislation to economically favor women, and they are entirely consistent with the decisions of this Court in cases involving gender-based classification statutes beginning in 1971 with *Reed v. Reed,* 404 U.S. 71 (1971). A careful analysis of the post 1971 sex discrimination cases should have made the results reached in *Goldfarb* and *Webster* a foregone conclusion. A similar analysis of these decisions should be conclusive in this case. A summation of the cases appears below.

In *Reed v. Reed* an Idaho statute gave preference to men over women in serving as administrators of estates, and it was invalidated as being violative of the Equal Protection Clause.

In 1973 the Court held unconstitutional a Federal statute which granted fringe benefits to servicemen that were withheld from service women in *Frontiero v. Richardson,* 411 U.S. 677 (1973).

A Florida statute granting a tax exemption to widows, and not widowers, was upheld in *Kahn v. Shevin,* 416 U.S. 351 (1974), since it economically preferred women, and the Court noted that such a preference was justified because a history of economic discrimination against women placed the lone woman in a disadvantaged position.

Early in 1975 this Court approved a Federal statute which provided for special treatment of female naval officers in *Schlesinger v. Ballard,* 419 U.S. 498 (1975).

A week after *Ballard* the Court struck down a Louisiana statute in *Taylor v. Louisiana,* 419 U.S. 522 (1975), which was said to be unconstitutional because it discriminated against women litigants by making jury services optional for women and mandatory for men.

In the Spring of 1975 the Court decided that a portion of the Social Security Act was unconstitutional because it allowed men to earn benefits for their survivors, without allowing women the same right, in *Weinberger v. Wiesenfeld.*[5]

Stanton v. Stanton, 421 U.S. 7 (1975), was the final 1975 case involving economic discrimination based on gender, and there a male preference statute which required parental support for men to age 21 and women to age 18 was held unconstitutional.

In summary: Men preference statutes were held unconstitutional in *Reed, Frontiero, Taylor, Stanton,* and *Goldfarb;* and women preference statutes were held constitutional in *Kahn, Schlesinger, Wiesenfeld,* and *Webster.* In every case the statutes economically favoring females have been approved, and the statutes economically favoring males have been disapproved.

Mr. Orr has cited the cases of *Stanley v. Illinois,* 405 U.S. 645 (1972), and *Craig v. Bowen,* 429 U.S. 190 (1976), as examples of cases in which female preference statutes were held unconstitutional. These cases are inapplicable to the issues here presented because the purpose of the statutes under consideration in those cases was not to confer an *economic* preference on women.

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[5] See discussion of *Califano v. Goldfarb, supra.*

The statute in *Stanley* favored females in child custody proceedings, and the statute in *Craig* favored females in the purchase of alcoholic beverages. The principles established by *Kahn, Schlesinger, Wiesenfeld,* and *Webster* only apply to statutes conferring an economic benefit on women so as to make up for the disparity created by the history of economic discrimination against women. The statutes involved in *Stanley* and *Craig* could not be construed to be for the purpose of relieving economic disparity, and they were therefore held to be unconstitutional.

Justice Douglas, writing for the majority, explained why statutes conferring an economic benefit on women are constitutional in *Kahn v. Shevin.* He noted statistics revealing that between 1955 and 1972 the median earnings for women were little more than half the median earnings for men,[6] and in 1970 while 73.9% of working women earned less than $7,000.00, 70% of working men were earning more than $7,000.00.[7] On the basis of the available data it was concluded that there is a disparity between the conomic capabilities of a man and a woman. Legislation designed to cushion the financial impact of spousal loss upon a widow is a legitimate governmental objective because:

> "The disparity is likely to be exacerbated for the widow. While the widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer."

[6] *Kahn v. Shevin, supra,* n. 5.

[7] *Id.* n. 4.

The divorcee finds herself just as economically disadvantaged as the widow, so Justice Douglas' comments regarding the acuteness of the problem faced by the widow apply with equal force to the divorcee's situation. Therefore, legislation designed to alleviate the problem encountered by the divorcee is constitutional.

In its *Per Curiam* opinion in *Califano v. Webster* this Court noted that classifications by gender must serve important governmental objectives, and cited *Kahn* for the proposition that:

> "Reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective."

II

APPELLANT'S POSITION

In *Webster* the Court recognized two instances in which gender classifications allegedly having a benign, compensatory purpose cannot be justified: (1) if the legislation in fact penalizes women wage earners; or (2) if the statutory structure and its legislative history reveal that the classification was not designed as compensation for past discrimination. The thrust of Mr. Orr's argument is that the Alabama Alimony Law in fact penalizes women, and was not designed to compensate for past discrimination. These two facets of Mr. Orr's argument will be analyzed below.

A. Penalty

The Alabama Alimony Law penalizes women, according to Mr. Orr, because it motivates the divorced wife to remain protected at home.[8] *Amicus* says that the law

[8] Appellant's brief, p. 24.

steers the husband into the business world, and the wife into the home, thereby discouraging the divorced wife from achieving economic independence.[9]

Mr. Orr and *Amicus* have the idea that women will not work because they might be able to require their husbands to support them after divorce.

There is no factual basis for the assertion that the prospect of alimony encourages a divorced wife to stay at home. In fact, divorce appears to motivate the woman to enter the business world. Bureau of Labor Statistics for March of 1976 show that 71.4% of the divorced women participate in the labor force, as compared with all women who have a participation rate in the labor force of 46.8%.

Aside from the factual invalidity of Mr. Orr's argument that the alimony system keeps women out of the job market, it has no basis in reason. It is no more reasonable to suppose that a women will get out of the job market because of the prospect of receiving alimony, than it is to speculate that a man will get out of the job market because of the prospect of having to pay alimony.

Mr. Orr's argument is self defeating. If the Alabama Alimony Law were changed so that the trial court could award alimony to either party, it would still be the divorced wife, in the great majority of the cases, who would be the recipient of the alimony. This is so because need is an important consideration in awarding alimony:

> "It is proper to consider the wife's income or other means of support; the joint labor and capacity for work of the husband and wife; their joint income; sources from which the common property came; whether there are children to support; the nature,

[9] *Amicus Curiae* brief p. 27.

> expense and clearness of proof of the husband's delictum; the ability of each to earn money; the husband's condition in life, health, and needs; and the ages of the parties."[10]

Women are more likely to be in need at time of divorce than men. Bureau of the Census figures for 1974 show that the median earnings of women were only 57.2% of men's median earnings, so we can reasonably assume that in the event of divorce the wife would most often be the one to be awarded alimony. Since the wife would continue to be the major recipient of the alimony, even if the statute were chaned as suggested by Mr. Orr, the motivational impact of alimony would remain the same as it is under the present Alabama law.

Regardless of motivations there is no problem with women entering the labor force and seeking economic security. This Court recognized in *Stanton v. Stanton* that the trend is toward an expansion of women's roles:

> "No longer is the female destined solely for the home and the rearing of the family, and only the male for the market place and the world of ideas. Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice."

The problem is not that women are staying out of the job market, but that past discrimination has made them less equal to the task than men, and they are treated unfairly when they get there. Professor Amundsen has described the economic plight of the woman:

[10] *Frazier v. Frazier*, 273 Ala. 53, 134 So.2d 205 (1961).

"Median incomes among all families headed by women (in 1969) was no more than $4,000.00—that is, about one-third the median income of husband-wife families in the same year. And, in most families in which the woman head worked, the level of family income was determined by her earnings. The myth of American women living high on widow's pensions, alimony payments, or child support is effectively exploded by the following figures: The median contribution to family income of women who were family heads was 72% in 1968. What this means is that less than 30% of the meager income enjoyed by these 5.6 million single women with children or other family members to support came from the late husband, the ex-husband, the father, or any other source.

Even more sobering is the discovery that, of the women struggling to support a family without the help of a husband, 2.4 million live in poverty with the 4.5 million children who are their sole responsibility. (We use here a definition of poverty which is conservative in the eyes of many critics—an income of $3,535.00 for an urban family of four, as of 1968). Three out of every five children in families headed by women are poor. In fact, if we accept the economists' figure of $4,855.00 as designation of the 'near-poor' urban family in 1969, we find that this is *above* the median income among all families headed by women.

The implications of these findings should be clear. An American women today has to face up to the very real possibility that she may live part or most of her adult life alone. Her chances in that regard are one out of three or four. If she is a widow, the chances of her having to take up work is roughly one out of three, and if she is divorced, two out of three. She is almost more likely to have children to support in her single state; 77% of the working divorcee and 40% of the working widows had children under 17 in 1969.[11]

Based on the statistical information noted above, and careful analysis, there is no justification for Mr. Orr's assumption that the alimony system in Alabama traps men andwomen in traditional gender roles. This alimony system has no effect on roles undertaken by men and women. It does make a small concession to the women by attempting to make up for her economic dependence.

B. Statutory Structure and Legislative History

Mr. Orr argues that the Alabama Alimony Law, as revealed by its structure and history, was not enacted as compensation for past discrimination because it is based on the common law obligation of a husband to support his wife. It is true that *Webster* requires that statutes favoring one sex be enacted as compensation for past discrimination in order to pass judicial scrutiny, and it is true that the Alabama Alimony Law is based on the common law obligation of a husband to support his wife. However, it is not true that the common law required the husband to support his wife for reasons other than compensation.

Mr. Orr says that the common law obligation of support was based on archaic paternalistic and romantic notions of the inferiority of women and their place in society. What Mr. Orr overlooks is that fact that the support obligation was imposed by the common law to compensate the wife for the discrimination she suffered at the hands of the common law.

The common law stripped the married woman of many of her rights and most of her property, but it

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[11] Amundsen, *The Silenced Majority*, 27-28 (1971).

attempted to partially compensate by giving her the assurance that she would be supported by her husband.

It is not difficult to find authorities supporting the position that the wife was deprived at common law. The wife's status as a nonentity was described by the Alabama Supreme Court in *Strouse v. Leipf,* 101 Ala. 433, 14 So. 667 (1893):

> "The authorities are uniform that the husband is the head of the family, so long as the marital relation is maintained. He determines where the home shall be, is entitled to the wife's labor and services, has the right to have her society, controls the home and the household, and, with limited exceptions, she must obey his commands. In domestic management she is not presumed to have an independent will of her own * * * The husband has, in consequence of his marriage, a right to the custody of his wife, and whoever detains her from him violates that right, and he has a right to seize her wherever he finds her.
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> * * *
>
> The doctrine of the common law is, that by marriage the husband and wife become one person in law; that she is under his protection, influence, power and authority, and that he is the head of the household. This condition of the wife is designated by the expressive term *coverture.*" (emphasis supplied)

Since the common law required the wife to subordinate herself to her husband, and give up rights she held as a single person, it obligated the husband to compensate her for these discriminations. The Court of Appeals of Alabama acknowledged the compensatroy function of the support obligation in *Joyner v. McMurphy,* 26 Ala. App. 549, 163 So. 533 (1935):

> "In this state, subject to certain statutory changes, not here involved, the common law rule obtains. Here, the husband is the head of the household, and as such has certain liabilities, and, except where they have been limited by a statute, the husband has all the rights to which he is entitled under the common law. * * * The husband furnishes the name, the domicile, and generally the support and maintenance of the family according to the station in life in which they live, * * * *In return for this support,* the husband is entitled to the wife's services in all those domestic affairs which pertain to the comfort, care, and well being of the family. Her labor is her contribution to the family support and care. * * * When boarders were taken into the home, in the absence of a special contract to the contrary, the amount due for board was payable to the husband as the head of the household, and the right to sue was in him." (emphasis supplied)

The Alimony Law continues the common law support obligation of the husband after divorce. Because the common law support obligation was compensatory, the Alimony Law is likewise compensatory. Since the Alimony Law was designed and enacted to compensate women for past discriminations it complies with the requirement of *Webster* that the structure and history of the legislation reveal that the classification was designed as a compensation for past discrimination.

CONCLUSION

The Alabama Alimony Law confers an economic preference on women in order to reduce the disparity in economic condition between men and women caused by a long history of economic discrimination against women. The law does not penalize women and its structure and history reveal that it was enacted as compensatory legislation.

The Alabama Alimony Law should be declared constitutional, and the judgment of the Alabama Supreme Court should be affirmed.

Respectfully submitted,

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